(5)

No. 87-1629

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

NATIONAL CAN CORPORATION, et al.,
Appellants,

VS.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of Washington

BRIEF AMICUS OF THE INSTITUTE OF PROPERTY TAXATION IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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24 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Constitution

In the Supreme Court

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BRIEF AMICUS OF THE INSTITUTE OF PROPERTY TAXATION IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

PRELIMINARY STATEMENT

Attached hereto and marked Exhibit A is the written consent of the Appellant, National Can Corporation, consenting to the filing of an *amicus* brief by the Institute of Property Taxation in support of the Appellants' Jurisdictional Statement. Attached hereto and marked Exhibit B is the consent of the Attorney General of the State of Washington, on behalf of the Appellee, State of Washington Department of Revenue, consenting to the filing of a brief *amicus curiae* in support of National Can Corporation's appeal to the United States Supreme Court.

INTEREST OF THE AMICUS CURIAE

The Institute of Property Taxation (the "Institute") maintains its offices at 122 C Street, N.W., Suite 200, Washington, D.C. 20001. The Institute is a not-for-profit corporation organized under the laws of the District of Columbia. It is dedicated to fostering and promoting uniform and equitable administration of both *ad valorem,* sales and use taxes, and other forms of state and local taxation, excepting income taxes. The Institute was founded in 1976 as a committee of the Council of State Chambers of Commerce, and was separately incorporated in 1985. The Institute is dedicated to promoting the uniform and equitable administration of state and local taxation through promotion of education and professionalism of its members, promotion of the collection and exchange of useful information and assistance among its members, cooperation with governmental bodies in improving state and local tax administration (other than income tax administration), and establishment and promotion of high standards of competence and efficiency in tax management. The goals of the institute are to be reached in part by review and dissemination of information, and in part by the sponsorship of educational functions and the award of professional designations in the field of property and sales and use taxes.

The Institute, in addition to its bylaws, has a written code of ethics whereby each member agrees that he or she shall be professional and objective in performing responsibilities with government, the public, and fellow members; shall assume an obligation to develop the sound administration of property and state and local tax (other than income tax) law and the adoption of equitable tax legislation; shall conduct himself or herself with due regard for the interests of society, as well as those of his

or her company and its employees; shall endeavor to establish valuations and all other tax liabilities in accordance with acceptable practices and standards; and shall employ outside representatives upon the basis of technical competence, having due regard for the highest standards of professional ethics.

The decision of the Supreme Court of Washington in *National Can Corporation, et al., Appellants v. The Department of Revenue*, filed January 28, 1988, is so far-reaching in its scope and involves such a radical interpretation of this Court's decsion in *Tyler Pipe Co. v. Washington Dept. of Revenue*, 483 U.S. ____, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987), that the Institute, through this brief, respectfully requests that this Court note jurisdiction to resolve the questions raised by Appellants.

OPINIONS BELOW

The opinion of the Washington Supreme Court is set forth in Appendix A of the Jurisdictional Statement of the Appellants, National Can Corporation, et al., and is reported at 109 Wash.2d 878, 749 P.2d 1286 (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS

While there are matters involving the Revised Code of Washington, which is reproduced in pertinent part in Appendix C of the Appellants' Jurisdictional Statement, the Commerce Clause (Art. I, § 8, cl. 3), the necessity that the courts decide "cases" and "controversies" (Art. III, § 2), and the Supremacy Clause (Art. VI) of the United States Constitution are the matters which concern Amicus and are set forth herein in Exhibit C.

STATEMENT OF THE CASE

Following determination by this Court in *Tyler Pipe Co. v. Washington Dept. of Revenue*, 483 U.S. ____, 107 S.Ct. 2810, 97 L.Ed.2d 199 (June 23, 1987), the Washington Supreme Court made a determination that, although the statutes relating to the application of Washington's Business and Occupation Tax may have been unconstitutional and although the Washington Supreme Court had stated that if a tax were in violation of the Due Process or Commerce Clause, it would be in violation of the local tax refund statute, an additional basic inquiry must be made. That inquiry was whether or not the *Tyler* decision, *supra*, would be applied prospectively only, so that refunds would be unavailable to the taxpayers involved in the *National Can Corporation* cases. The action had originally been brought for refund of specified business and occupation taxes paid to the State of Washington.

This Court, in *Tyler*, vacated the judgment of the Washington Supreme Court denying recovery, concluding that the reasons for invalidating the West Virginia tax in *Armco, Inc. v. Hardesty*, 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984) also applied to the tax challenged in *Tyler*. This Court observed that the *Armco* court had endorsed the dissent of an earlier case involving Washington State's business and occupation tax, *General Motors Corp. v. Washington*, 377 U.S. 436 at 459, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964). *Tyler*, 107 S.Ct. at 2816.

This Court, in noting Washington's plea for nonretroactivity (on the grounds that the taxes at issue were assessed prior to the opinion in *Armco*) and that the holding in *Armco* was not clearly foreshadowed by earlier opinions, because of the potential application of state law and the possible need for an expanded record, remanded

the matter to the Washington court to address the refund issue in the first instance. *Tyler* at 2822-23.

However, the Washington Supreme Court, on remand, found no need for an expanded record, conceding that the Washington statutory law mandates a refund of taxes unconstitutionally collected. Notwithstanding this, the court denied all refunds for claims prior to June 23, 1987, the effective date of the *Tyler Pipe* decision. It did not limit its consideration of prospective application to taxes collected before the *Armco* decision. It based its decision upon the thesis that when *Tyler* was decided and held to be facially discriminatory, a new rule of law had been adopted, particularly in light of the fact that, to the extent that the U.S. Supreme Court's conclusion in *Tyler* was inconsistent with *General Motors Corp. v. Washington, supra, General Motors* was overruled. The Washington Supreme Court also observed that it had held the "internal consistency" rule not applicable to a determination of discrimination in a gross receipts tax case. Therefore, when *Tyler* was decided and held to be facially discriminatory, a new rule of law had been adopted, and the *Armco* court's reference to the dissent of Justices Goldberg, White and Stewart in *General Motors,* without overruling the other cases on which the Washington Supreme Court relied, did not clearly indicate that the Washington tax statutes involved in *Tyler* were unconstitutional. Furthermore, the court stated, it could not be expected that *Armco* clearly foreshadowed *Tyler.*

The Washington Supreme Court came to its conclusion notwithstanding a letter from the Department of Revenue to the Governor of Washington (just after *Armco* was decided), that Washington's multiple-activities exemption was unconstitutional. The Court said such a state-

ment would not be binding on either the State or the court.

Having decided that *Tyler* established a new principle of law, the Washington Supreme Court then proceeded to look at the purpose of the Commerce Clause, to determine if it would be furthered or retarded by retroactive application. It concluded that the award of such taxes to the plaintiffs would be in the nature of punitive award for the misconstruing of the business and occupation tax by the Washington Supreme Court. The court stated that whatever chill was imposed upon interstate trade was in the past, and the legislature had enacted law to attempt to comport with the new Commerce Clause taxation rules announced in *Tyler*.

The Washington Supreme Court further stated that the fact that, in argument seeking an injunction, the State itself had argued that taxpayers had an adequate remedy at law in the form of a possible refund, did not mean that the State is foreclosed from arguing that such a refund is not (under applicable preexisting law) now owed to the taxpayers.

THIS COURT SHOULD FIND THAT IT HAS JURISDICTION TO HEAR THE APPEAL

A. The Decision of the Washington Supreme Court Following Remand Makes Nullities of the Decisions of this Court Which Protect Interstate Commerce from State Tax Discrimination.

If the rule against discrimination is to have any validity, the states should not be in a position to be able to keep what have, since *Armco* at least, been the fruits of their discrimination. In essence, the action of the Washington Supreme Court in this case strikes a fatal blow to any taxpayer who has suffered the discrimination result-

ing from legislation of the type set aside by this Court. In effect, a taxpayer who undertakes the litigation and incurs all of the massive expenses accompanying such litigation will receive no refund for the unconstitutionally collected taxes. Under such a circumstance, as set forth on page 16 of the Appellants' Jurisdictional Statement, Washington State has no equity. The State consciously persisted in defending the statutes, which were unconstitutional and were set aside, and in obtaining the fruits of its discrimination even though, since *Armco,* the judicial handwriting clearly had been on the wall. Indeed the State of Washington participated as amicus curiae in *Armco.* (*Armco, supra,* p. 645) While a court of equity may fashion remedies in tax cases, that right does not permit the removal of the benefits of the successful litigation.

However, unlike *Chevron Oil Co. v. Huson,* 404 U.S. 97, 107; 30 L.Ed.2d 296, 92 S.Ct. 349 (1971), there simply is no inequity imposed by retroactive application. In *Chevron, supra,* a personal injury case, it was held that the Louisiana statute of limitations should not be applied because it would deny respondent of any remedy at all. *Chevron, supra,* at pp. 106-108. But to assert that this applies to taxation, where, in every case, as a matter of equity, the taxes must be paid before they can be contested, where it has been deemed and stated by counsel for the State that an adequate remedy exists, and where Washington had participated in the *Armco* case as amicus makes it inequitable to deny recovery. In short, the decision in *Tyler* was quite foreseeable.

This is particularly true where the record discloses no fact which makes the refund inequitable (indeed, where no additional record had been made). In short, the State could have set up a reserve to refund the taxes, being on

notice of the actions that were being brought, and could have avoided bootstrapping itself into a hardship situation. The end result of the action of the Washington Supreme Court will be that there will always be determined a "new principle" where the tax administrator or the state court has failed to understand a decision of this Court involving the Commerce Clause or any other type of fundamental federal constitutional principle. Moreover, it is respectfully submitted that the letter written by the Washington tax administrator to the Governor of the State of Washington was, in essence, a plea to set aside the tax moneys collected and not to spend them, pending the outcome of the decisions which were to follow *Armco.* The end result of the affirmance by the Washington Supreme Court following the remand of *Tyler* will be to make it profitable to discriminate and to put a chill on interstate commerce, because the actions will always be in the "past." The position of the Washington Supreme Court following remand in light of its decision in *Columbia Steel Co. v. State,* 30 Wash.2d 658, 662-664, 192 P.2d 976 (1948), set forth in footnote 8 of *Armco* at p. 645, makes one doubtful of the assertion that *Tyler* involved a new unforeseen shift in the law. Washington's amicus position in *Armco* also throws doubt on such an assertion.

It is also respectfully submitted that if the tax impact upon the State of Washington was so great should the refunds have been granted, then the Washington court should have taken evidence in order to determine the impact of the tax refunds and to have worked out an appropriate remedy by way of credits and offsets. Perhaps payment could have been made on an installment basis which would have been in the nature of the issuance of bonds or notes payable over a period of time and bearing appropriate interest, but which would not have further deprived the plaintiffs of the right to receive a

refund, nor further exacerbated the discrimination inherent in the original statutes.

B. The Decision of the Washington Supreme Court Makes the Decision of the United States Supreme Court Merely Advisory.

If the courts of a local jurisdiction must find that, before a tax refund can be given, the local court or tax administrator must have known that the United States Supreme Court would be articulating a new principle of law before a refund would be required, then the decision of this Court in *Tyler* becomes merely advisory. Such a rule would apply not only to the "facial discrimination" basis of *Tyler,* but to every type of a decision, not necessarily involving state and local taxation alone, no matter on what basis the decision was grounded.

For instance, if the statute would take away the substantive due process rights of a taxpayer, or if it involved a clear denial of the equal protection of the laws by selecting a taxpayer without a reasonable basis for classification, or if no procedural due process remedy were available under the statute, then the line of cases decided by this Court from which a legislator, a court or a taxpayer could have determined that there would be a violation of any of the fundamental rights, would nevertheless preclude a taxpayer from receiving a refund because the local authorities "did not clearly" have an indication that the local statute was unconstitutional. In short, the impact of the Washington decision makes the decision in *Tyler merely an advisory decision, in violation of Art. III and Art. VI of the United States Constitution.*

The Washington decision squarely is opposed to the decision of this Court in *Simpson v. Union Oil Co.,* 396 U.S. 13, 15, 24 L.Ed.2d 13, 90 S.Ct. 30 (1969). There the

Supreme Court following remand, in a matter involving public policy refused to apply retroactivity to the parties. In *Simpson v. Union Oil,* 377 U.S. 13, 12 L.Ed.2d 98, 81 S.Ct. 1051 (1964) the Supreme Court had held that a "consignment agreement" for the sale of gasoline required by the defendant of lessees of its retail outlets violated the Sherman Act. The case was remanded for hearing on other issues and for a determination of damages. The Court had stated in the last sentence of its opinion, "We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price-fixing by the 'consignment' device which we announce today." *Simpson v. Union Oil Co.,* 377 U.S. 13, 24-25. Upon remand, the district court held that retroactive application would be unfair and that the rule should be given prospective effect only. It set aside as excessive a jury verdict awarding the plaintiff damages. The Court of Appeals for the Ninth Circuit affirmed (411 F.2d 897). This Court granted *certiorari* on the issue of whether its decision should be given mere prospective effect, and reversed the lower court, stating, at page 14 of 396 U.S.:

> "The question we reserved was not an invitation to deny the fruits of successful litigation to this petitioner. Congress has determined the causes of action that arise from antitrust violations; and there has been an adjudication that a cause of action against respondent has been established. Formulation of a rule of law in an Article III case or controversy which is prospective as to the parties involved in the immediate litigation would be most unusual, especially where the rule announced was not innovative. . . ."

Since the rule of *Armco* incorporated into *Tyler* was not innovative, and since there was no real factual determination of the equities, and since the Appellee clearly, together with the other parties set forth in Appendix D of Appellants' Jurisdictional Statement, was a party to the litigation, the net effect of the Washington decision is to make this Court's decision an advisory decision only, and the actions of the Appellants' useless acts. Of greater importance, however, is the impact upon tax litigation generally. The decision of the Supreme Court of Washington is an invitation for taxing agencies to make the decisions in *Armco* and *Tyler* merely advisory and of no effect. That the States are adopting prospective application in tax cases following decisions by this Court on the basis of discrimination against interstate commerce is apparent from the State actions which occurred in the following cases: *American Trucking Association, Inc. v. Gray*, 483 U.S. ____, 108 S.Ct. 2, 97 L.Ed.2d 790 (1987); *American Trucking Association v. Gray*, No. 85-101, 1988 Westlaw 21852 (Ark., Mar. 14, 1988). The Arkansas court deemed the State not to be on notice of the decision of this Court in *American Trucking Association, Inc. v. Scheiner*, 483 U.S. ____, 107 S.Ct. 3252, 97 L.Ed.2d 226 (1987).

CONCLUSION

For the reasons expressed herein, this Court should note probable jurisdiction. The proceedings of the Washington Supreme Court following remand were inconsistent with the opinion of this Court in *Tyler*. A hearing is required in order that this Court determine that a remedy be fashioned pursuant to the holdings of *Armco* and *Tyler* in order that the provisions of Article I, Section 8, Article III and Article VI of the Constitution remain meaningful.

Respectfully submitted,

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Institute of Property Taxation

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EXHIBIT A

BOGLE & GATES

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April 7, 1988

Mark Ancel, Esq.
Baker & Ancel
626 Wilshire Boulevard, 7th Floor
Los Angeles, CA 90017

Re: National Can Corporation, et al. v. Washington Department of Revenue, 109 Wn.2d 878 (1988)

Dear Mr. Ancel:

This is to confirm that the appellants, National Can Corporation, et al., will appeal the above entitled case to the United States Supreme Court. On behalf of such appellants we hereby consent to the filing of an amicus brief by the Property Tax Institute in support of the appellants' jurisdictional statement.

We have contacted William Collins, Assistant Attorney General for the State of Washington, to ask if the State will likewise consent. Mr. Collins anticipates that it will but asks that you confirm your request in writing to him at the address shown below. Thank you.

Very truly yours,

BOGLE & GATES

John T. Piper, P.S.

cc: William B. Collins, Esq.
Assistant Attorney General
State of Washington
Department of Revenue
415 General Administrataion Bldg.
Olympia, WA 98504

EXHIBIT B

Ken Eikenberry
ATTORNEY GENERAL OF WASHINGTON
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April 13, 1988

RECEIVED APR 15 1988

Mark G. Ancel
BAKER & ANCEL
626 Wilshire Boulevard, Seventh Floor
Los Angeles CA 90017

Re: National Can Corporation, et al. v. State of Washington, Department of Revenue
U. S. Supreme Court Docket No. 87-1629

Dear Mr. Ancel:

This is in reply to your letter dated April 11, 1988 requesting consent to file a brief as amicus curiae, in support of National Can Corporation's appeal in the above-referenced case to the United States Supreme Court.

On behalf of the State of Washington, Department of Revenue, I consent to the filing of a brief in support of National Can's Jurisdictional Statement by the Institute of Property Taxation, pursuant to Rule 36.1 of the Rules of the Supreme Court of the United States.

Very truly yours,

William B. Collins
Assistant Attorney General
(206) 753-5528

WBC:lw

EXHIBIT C

EXHIBIT C

CONSTITUTIONAL PROVISIONS

United States Constitution, Article I:

> Section 8. The Congress shall have Power . . . ;
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .

* * *

United States Constitution, Article III:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between citizens of different states; — between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * *

United States Constitution, Article VI:

* * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On April 28, 1988, I served the within; Amicus Brief in re: "National Can Corporation vs. State of Washington Department of Revenue" in the United States Supreme Court, October Term 1987, No. 87-1629;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

D. Michael Young, Esq.
John T. Piper, Esq.
Christopher N. Weiss, Esq.
Bogle & Gates
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Attorneys for Appellants
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7th Floor, Highways-Licenses Building
Olympia, Washington 98504-8071
Attorneys for Appellee State of Washington
Department of Revenue

All Parties required to be served have been served.

I certify under penalty of perjury, that the foregoing is true and correct.

Executed on April 28, 1988, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA